SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro se, respectfully requests that this Court grant rehearing of its order dated November 5, 1973, which denied certiorari, and that the Court now grant certiorari. The petitioner received a time extension to file Petition For Rehearing to February 12, 1974. As grounds for this motion, petitioner states the following;

I. Petitioner's Difficulties With The Court Below And Attoneys

I realize that petitions are not likely to succeed, but this is an unusual case.

My trial attorneys refused to represent me during the critical ten day period following the judgement.

Despite the fact that the jury found defendants have wronged me and awarded substantial damages, the way in which the case was tried by counsel, the way in which the trial judge conducted the trial, and the grudging nature of the affirmance of the Court of Appeals have left me in a worse position than the wrongdoers.

Although both courts below concluded that I have been wronged, I have lost my home (Through deceit & chicanery, trial counsels purportedly purchased my home for $500, my home had no mortgage and was assessed for $32,540), my trial counsel informed me that they are charging me $350 per month rent, my trial counsel removed $3,070.60 which was in my savings account, my trial counsel have informed me that their charges are in excess of $30,000, and my trial counsel have informed me that they have a lien against the judgement. My trial counsel are charging me with attorneys fees and court costs even though I had won in the Federal court and even though I was informed that attorneys fees and court costs were to come from the court.

My trial counsel would not appeal the verdict and would not turn over my files to me.

My files contained materials from two Certified Public Accountants which I had paid $1,380 for, and my files also contained materials that I had paid $9,500 for to prior attorneys.

My wife has received mail from my trial counsel which is a form of harrassment. My wife was never a party to my action.

The harrassment has resulted in illness to me and my family.

The attorney that was suppose to represent me, subsequently would not represent me and now I am obliged to represent myself.

It is for these reasons as well as the reasons set forth on the following pages that I pray that the Court will reconsider my petition.

THE ISSUES ARE OF PUBLIC IMPORTANCE AS TO THE ADMINISTRATION OF JUSTICE

THE ISSUES ARE OF PUBLIC IMPORTANCE AS TO THE ENFORCEMENT OF THE FEDERAL SECURITIES LAWS FOR THE PROTECTION OF THE INVESTING PUBLIC.

THERE IS A CONFLICT BETWEEN THE CIRCUITS

II. THE DISTRICT COURT AND THE COURT OF APPEALS, IN REGARDS TO PLAINTIFF'S CHURNING CLAIM, IS DEPRIVING THE PLAINTIFF THE PROTECTION AND REMEDY AFFORDED UNDER SECTION 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934

The Court of Appeals, in my case, state, in regards to the "churning" issue, in their Opinion (Pet., Appendix A, Page 100) (473 F.2d 373)(emphasis added):

"We now turn to plaintiff's contention that the district court erred in granting defendants' motion for judgement n.o.v. on his churning claim."

Facts - Nowhere in plaintiff's Brief on Page 75-8, Reply Brief on Page 26-8, and Petition For Rehearing on Page 14-5 (Pet., Appendix C, Page 120-2) which was before the Court of Appeals and is in regards to the plaintiff's churning claim, did the plaintiff ever contend that the court erred in granting defendants motion n.o.v. on his churning claim.

Plaintiff contended that the District Court erred in refusing to instruct the jury, on plaintiff's requested instructions, which would have made defendants liable jointly and severally to the same extent, in conformity with the evidence and with Section 20(a) of the Securities Exchange Act of 1934.

The Court of Appeals, in my case, state, in regards to the "churning" issue, in their Opinion (Pet., Appendix A, Page 100) (473 F.2d 373) (emphasis added):

"While we accept the jury's apparent conclusion that defendants exercised the necessary control over plaintiff's account, we are nevertheless convinced that there was insufficient evidence to support a finding that the account had been overtraded. We therefore affirm the decision below on this issue."

Facts - There was established a preponderance of evidence that plaintiff's account was overtraded.
Plaintiff testified (Tr 187) that his salary, during the period of complaint, had a range between $15,000 and $25,000.
Defendant Murphy testified (Tr 903-4) to securities transactions he effected in plaintiff's account when Murphy was not a registered representative.
Defendant Winchester testified (Tr 606) that Murphy was receiving commissions when Murphy was not a registered representative.
To have allowed defendant Murphy to effect securities transactions in plaintiff's account when he was not a registered representative, all with the approval of defendants Winchester and Hemphill, Noyes

all in violation of the Rules of the New York Stock Exchange, indicates crystal clear that the defendants purpose was to derive profits for themselves while disregarding the interest of the plaintiff.
Defendant Winchester testified (Tr 867), "You don't turn away business".
Defendant Winchester testified that he works on a bonus based on commissions of the Worcester house and that in order to be some volume, there has to be a lot of transactions within an account and in many accounts (640,695-7).
There was uncontroverted testimony that there was a total transactions of $1,200,000 or $1,210,000 in plaintiff's account from January 1962 to the end of May 1964.(Tr146)
Defendant Murphy testified (Tr 964) that he didn't have to make inquiries as to plaintiff's financial affairs.
Mr. Shwartz, from S.E.C., testified that the defendants over extended credit in plaintiff's account on fourteen different occasions.
The above, is only some of the evidence in regards to churning. Plaintiff's Brief before the Court of Appeals not only includes the above but also indicates much more.

As indicated in documents (Brief, Reply Brief and Petition For Rehearing),

that was before the Court of Appeals, "The District Court granted defendants motion for judgement notwithstanding the verdict on plaintiff's "churning" claim, not because the plaintiff's account was not "churned" in violation of the Federal securities laws, but because the District Court (Appendix, Page 250d) had reservations as to whether the liability should have been jointly and severally.
The District Court erred in refusing to instruct the jury of plaintiff's requested instructions Nos. 4, 5, and 6 (Appendix, Page 236) which would have had the effect of making defendants liable jointly and severally to the same extent in conformity with Section 20(a) of the Securities Exchange Act of 1934.

During the trial, after plaintiff's case rested, there were some papers filed (Tr 722) and according to the court docket, on date of Mar. 5, 1971 (A 14) it was a motion for defendant Winchester for a directed verdict, which was denied. After defendants rested their case, there was a request, made orally, for a directed verdict for Winchester in regards to the churning claim (Tr 1042) and after argument, was denied (Tr 1083)(A 14).

The Court of Appeals, in their Opinion, state (Pet., Appendix A, Page 100) (473 F.2d 373):

"We base this conclusion on plaintiff's uncomplaining acceptance of what was done for him by defendants over a twenty-two month period"

Facts - Plaintiff testified (Tr 339) that a letter of complaint was sent out on May 18, 1964 and that on May 21st plaintiff received a telegram demanding $37,000 and that subsequently plaintiff's entire account was liquidated by defendant Hemphill, Noyes.

Defendant Murphy testified that he received the complaint in May, 1964 (Tr 978).

Plaintiff's letter of complaint of May 18, 1964 was before the District Court and the Court of Appeals and is indicated in the Appendix, Page 179. Said letter complained about excessive trading in plaintiff's account by the brokerage firm.

The Court of Appeals, in their Opinion, state (Pet., Appendix A, Page 100-1) (473 F.2d 373) (emphasis added):

"It was uncontroverted that Landry regularly received confirmation slips and monthly statements from Hemphill, Noyes setting forth the full details of every transaction entered, etc."

Facts - Defendant Murphy testified (Tr 903-4) to securities transactions that he effected in plaintiff's account when he was not a registered representative, all with the approval of defendant Winchester (Tr 700).

Plaintiff testified (Tr 84) that defendant Murphy never indicated to plaintiff that Murphy wasn't a registered representative.

The confirmation slips and monthly statements, also did not show that the defendants were over extending credit to the plaintiff in excess of the limits permitted under the Federal securities laws.

Therefore, the defendants never gave the full details of every transaction as the defendants never informed the plaintiff that they were willfully flagrantly violating Rules of the New York Stock Exchange and Federal securities laws. This acted as a fraud on the plaintiff.

There was evidence that Chrysler was purchased in plaintiff's account on one day and the following day it would be sold (Tr 98).

Mr. Joseph Shwartz, from the S.E.C., testified that the broker was effecting securities transactions and treating them as a long sale and should have been treated as short, which is a violation (Tr 458-9).

In the case of Hecht v. Harris, Upham & Co., 430 F.2d 1204 (1970) the Court found, "Brokerage firm was properly held liable for churning of customer's account by representative on ground that it did not maintain an adequate system of internal control and that in failing to be diligent it had not acted in good faith. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a)."

Plaintiff's Request For Instructions (A 236, Par. 4, 5, 6) regards churning would have made defendants Winchester and Murphy liable jointly and severally to the same extent as defendant brokerage firm. The Requests are as follows:

"4. The churning of the plaintiff's account by the defendant, Hemphill, Noyes & Co. resulted in a loss to the plaintiff of all commissions paid by the plaintiff to the defendant corporation."

"5. The churning of the olaintiff's account by the defendant, Philip J. Murphy resulted in a loss to the plaintiff of all commissions paid by the plaintiff to Hemphill, Noyes".

"6. The churning of the plaintiff's account by the defendant Walter Winchester resulted in a loss to the plaintiff of all commissions paid by the plaintiff to Hemphill, Noyes."

The District Court refused to instruct the jury on Plaintiff's Requested Instructions 4, 5, and 6 (Tr 1061) and stated,

"They talk in terms of really a directed verdict".

A timely objection was made (Tr 1158).

This matter is now before this Court (Pet. 14, Par. 19).

The District Court gave to the jury separate claim forms (Under Rule 49(b), F.R.C.P.) in regards to the churning claim.

The jury found, through a preponderance of evidence, that defendants were guilty of churning plaintiff's account and returned a verdict against defendants as follows (A 239-41)(Tr 1161-2):

$5,000 against Hemphill, Noyes
$1,000 against Winchester
$500 against Murphy

As can be seen by the jury verdicts, the District Court did not instruct properly as the defendants were not held liable jointly and severally to the same extent for churning plaintiff's account.

Although plaintiff's trial attorneys were not allowed to withdraw after the trial (Tr 1164-5), the day following the trial, Mar. 11, 1971, plaintiff's trial attorneys sent the following letter to plaintiff:

"This office will not file either a motion for a new trial or take an appeal on your behalf. This letter is also notice to you that we have a lien for services on the total amount of the judgement and interest accrued on said judgement. The amount of our lien is one-third of the total interest plus cost".

Plaintiff sent a copy of this letter to District Judge Garrity on Mar. 19, 1971.

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 19, 1971 and said letter is designated as Exhibit CR-2. The records have been transmitted to this Court.

On March 19, 1971, plaintiff sent a letter to District Judge Garrity which states, in part:

"Although you declined to permit them to withdraw from the case, they refused to represent me during the critical ten day period following judgement. As you know, I am not satisfied with the judgement or with the materials which went to the jury, I have attempted to retain other counsel but I have been informed that without a transcript it would be impossible to have counsel unfamiliar with the case to effectively vindicate my rights in the ten day period allowed by the Rules".

A copy of this letter is attached to a motion which petitioner filed with the Court of Appeals on June 14, 1971 and said letter is designated as Exhibit CR-1. The records have been transmitted to this Court.

A motion was filed for defendant Winchester, "Defendant Winchester's Motion For Judgement Notwithstanding the Verdict" (A 243-5) in regards to churning claim.

A motion was filed for defendant Hemphill, Noyes, "Defendants' Motion For Partial Judgement Notwithstanding The Verdict On Plaintiff's Churning Claim" (A 246-7).

Plaintiff, in writting, requested his trial attorneys to file a written response to the motions j.n.o.v.. Plaintiff's trial counsel refused to do so.